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even after the thrusts on each side by these two recent cases, the tendency of the court would appear to be to complete its destruction at the first opportunity.

THE EFFECT OF A RELEASE BY THE DECEASED ON THE STATUTORY ACTION FOR DEATH BY WRONGFUL ACT. — It is a much mooted question whether the beneficiaries may recover, under statutes similar to Lord Campbell's Act,¹ if there is a defense which would have prevented the deceased from recovering had he lived. The primary inquiry in every such case is whether the statute gives the beneficiary a new and independent right of action, recognizing a property interest of the relatives in the life of the deceased, or merely abrogates the common-law rule that tort actions die with the injured party. At common law there were two severe rules calling for statutory relief, — personal actions died with the party injured, and the relatives of a deceased person had no action for his wrongful death. It would seem tolerably clear that the legislature was addressing itself to the second of these common-law defects when it provided an action for the benefit of the next of kin, whereby damages for their "pecuniary injury resulting from such death" might be recovered. Yet the courts have been considerably troubled by the nature of the right created. There are conflicting expressions in the English cases.² The American courts are divided; a few construe their statutes as merely preserving deceased's right of action.³ By the weight of authority, however, a new cause of action accrues to the beneficiaries at the death of the deceased, in which they may recover the loss they have suffered from his death.⁴

Of course, under the minority view, any defenses good against the deceased would be good against those who succeed to his cause of action.⁵ But even those courts which give the beneficiaries a new cause of action frequently reach the same result, basing their decisions on the common statutory provisions that "the wrongful act must have been such as

¹ 9 & 10 VICT., c. 93. For a comparative table of American statutes, see TIFFANY, *DEATH BY WRONGFUL ACT*, 2 ed., p. xix and Appendix.

² See *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 555; *Griffiths v. Dudley, L. R. 9 Q. B. 357*. Cf. *Blake v. Midland Ry. Co.*, 18 Q. B. 93; *Seward v. The Vera Cruz*, 10 A. C. 59.

³ *Mooney v. Chicago*, 239 Ill. 414, 88 N. E. 194; *Williams v. Alabama Great Southern R. R. Co.*, 158 Ala. 396, 48 So. 485; *St. Louis, I. M. & S. R. R. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102.

⁴ *Rowe v. Richards*, 32 S. D. 66, 142 N. W. 664; *Spradlin v. Georgia Ry. & Electric Co.*, 139 Ga. 575, 77 S. E. 799; *Adams v. Northern Pac. Ry. Co.*, 95 Fed. 938; *Mahoney Valley Ry. v. Van Alstine*, 77 Oh. St. 395, 83 N. E. 667. See also cases cited in n. 13, *infra*; TIFFANY, *DEATH BY WRONGFUL ACT*, § 23. Most states now have survival statutes, providing that tort actions shall survive the death of the plaintiff and defendant or both, in addition to a statute like Lord Campbell's Act. See 15 HARV. L. REV. 854. The survival statute is usually held to give no right of action if the death was instantaneous. *Moran v. Hollings*, 125 Mass. 93. Maine and Michigan accordingly hold that the death statute applies only to cases of instantaneous death. *Dolson v. Lake Shore & M. S. R. R. Co.*, 128 Mich. 444, 87 N. W. 629. See TIFFANY, *DEATH BY WRONGFUL ACT*, §§ 43, 44-1. The limitation is, however, not generally accepted. *Commonwealth v. Metropolitan R. R. Co.*, 107 Mass. 236. See TIFFANY, *DEATH BY WRONGFUL ACT*, §§ 73, 74.

⁵ *Read v. Great Eastern Railway Co.*, L. R. 3 Q. B. 555; *Mooney v. Chicago*, 239 Ill. 414, 88 N. E. 194.

would have enabled the deceased to maintain an action if death had not ensued,"⁶ or that the beneficiaries may recover "if the deceased might have recovered had he lived."⁷ From these qualifications the courts argue that the accrual of the new right of action is made dependent on the existence of the original right at the death of the injured party.⁸ This interpretation may possibly be warranted under a statute like that in Kansas, containing the last of the above-mentioned provisions, but it is submitted that where, as in the majority of states, the statute requires only such a wrongful act as would have entitled the deceased to an action, the beneficiaries' right is dependent only on the acquiring of a cause of action by the deceased, not on its continued existence at his death.

If this interpretation is correct, it is important to make a distinction between two classes of defenses which may arise. Certain defenses, such as contributory negligence of the deceased or a contract exempting the injuring party from liability, prevent any right of action ever arising; there has been no "wrongful act" which would have entitled the deceased to recover if he had lived. Consequently, the beneficiaries could get no rights under any statute containing that requirement. The courts have uniformly held that the contributory negligence of the deceased will bar the beneficiaries;⁹ the same result has usually been reached when the deceased, previous to the accident, made a contract with the defendant, exempting him from liability, except of course in cases where such contracts are void as against public policy.¹⁰ On the other hand, such defenses as a release by the beneficiary, or a payment to him, merely put an end to a right of action that has once arisen. There has been a "wrongful act," and where that is all the statute requires, a subsequent release by the deceased should not cut off the beneficiaries' right of action.¹¹ This result was reached in a recent South Dakota case, in a careful and exhaustive opinion. *Rowe v. Richard*, 151 N. W. 1001. There are, however, only a few cases in accord with this decision,¹² the weight of authority holding that such a release will

⁶ See SOUTH DAKOTA COMP. LAWS, 1913, p. 444C, c. 301, § 1.

⁷ See KAN. GEN. STAT., 1909, §§ 6014, 6015.

⁸ *Sewell v. Atchison, T. & S. F. Ry. Co.*, 78 Kan. 1, 96 Pac. 1007; *State v. United Rys. & Electric Co. of Baltimore*, 121 Md. 457, 88 Atl. 229.

The Maryland statute (ANN. CODE PUB. CIV. LAWS 1911, Art. 67, §§ 1-4) is like that in South Dakota.

⁹ *Weatherly v. Nashville, C. & St. L. Ry. Co.*, 166 Ala. 575, 51 So. 959; *Perkins v. Oxford Paper Co.*, 104 Me. 109, 71 Atl. 476.

¹⁰ *Northern Pac. Ry. Co. v. Adams*, 192 U. S. 440 (reversing 95 Fed. 938); *Sewell v. Atchison, T. & S. F. Ry. Co.*, 78 Kan. 1, 96 Pac. 1007; *Perry v. Philadelphia, B. & W. R. R. Co.*, 77 Atl. 725 (Del. Super.). See 13 HARV. L. REV. 309. The *Sewell* case (*supra*) properly distinguishes contracts exempting from liability from those limiting liability. If the contract is of the latter kind, the deceased acquires a right of action, and an action accrues to the beneficiaries. *Railway Co. v. Martin*, 59 Kan. 437, 53 Pac. 461; see *Illinois Cent. R. R. Co. v. Cozby*, 174 Ill. 169, 50 N. E. 1011.

¹¹ See ELLIOTT, RAILROADS, § 1376. It is proper that the wrongdoer be forced to make two satisfactions where his single act has invaded the distinct rights of two people, — the injured party's right to personal immunity, and his relatives' pecuniary interest in his life.

¹² *Donahue v. Drexler*, 82 Ky. 157; *Strode v. St. Louis Transit Co.*, 87 S. W. 976 (Mo.); *Maguire v. Cinn. Traction Co.*, 33 Ohio Cir. Ct. 24.

There are also several cases holding that a recovery by the executor for the benefit

bar the beneficiaries.¹³ If the statute gives a new, independent cause of action, it is certainly anomalous to permit the deceased to release or discharge a claim which does not belong to him and which does not accrue until his death. In breaking away from the confining interpretation generally put upon these remedial enactments, the principal case seems to reach a logical and satisfactory result.

LIMITATIONS UPON A STATE'S JURISDICTION OVER FOREIGN CORPORATIONS.—A recent decision of the Supreme Court of the United States¹ raises again the problem as to the nature of the jurisdiction which a state has over a foreign corporation. *Simon v. Southern Ry. Co.*, 236 U. S. 115. A judgment against such a corporation had been obtained on a cause of action arising outside the state under a state statute providing for service of process on the secretary of state when there had been a failure to designate a proper agent to receive it. This method of obtaining jurisdiction was held to be in violation of the constitutional guaranty of due process of law.

It is the theory of the common law that a corporation cannot exist beyond the confines of the jurisdiction which created it. A state can therefore never obtain personal jurisdiction over a foreign corporation by means of its actual presence in the state, and must gain control if at all by some other method. Since a state has the power in general to prevent such a corporation from engaging in business within its borders,² *a fortiori*, it may impose conditions upon it which it must accept before it can act legally within the state.³ There are no limitations, other than possible constitutional ones, which will be discussed later, upon the restrictions which may thus be made.⁴ So the states have usually provided by statute that a corporation must consent to be sued in the courts of the state as a condition precedent to entrance, and consent is of course as good as actual presence as a foundation for jurisdiction *in personam*.⁵ If the corporation sends no regular agents to do business,

of the deceased's estate will not bar a recovery by the next of kin. This is a necessary recognition that an entirely new right is created. *Spradlin v. Georgia Ry. & Electric Co.*, 139 Ga. 575, 77 S. E. 799; *Rowe v. Richards*, 32 S. D. 66, 142 N. W. 664; *Mahoney Valley Ry. v. Van Alstine*, 77 Oh. St. 395, 83 N. E. 607.

¹³ *Southern Bell Telephone & Telegraph Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881; *Michigan v. Boyne City, G. & A. R. R. Co.*, 141 N. W. 905 (Mich.); *State v. United Railway & Electric Co. of Baltimore*, 121 Md. 452, 88 Atl. 229. See 14 HARV. L. REV. 296. **TIFFANY, DEATH BY WRONGFUL ACT**, § 124. The Georgia court reaches this result, although holding that a recovery by the estate under the survival statute will not bar the action by next of kin. *Cf. Spradlin v. Georgia Ry. & Electric Co.*, 139 Ga. 575, 77 S. E. 799. This result is all the more extraordinary, because the Georgia statute does not require that the deceased could have recovered if death had not ensued. GA. CODE, 1910, § 4424.

¹ A statement of the facts of this case will be found on p. 815 of this number of the REVIEW.

² *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28.

³ *Paul v. Virginia*, 8 Wall. (U. S.) 168.

⁴ BEALE, FOREIGN CORPORATIONS, § 121.

⁵ *Copin v. Adamson*, L. R. 9 Ex. 345. See for a typical recent case, *W. J. Armstrong Co. v. New York Central, etc. Co.*, 151 N. W. 917 (Wis.).